Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No.

NORTHERN VIRGINIA SUN PUBLISHING COMPANY, a co-partnership composed of GEORGE W. BALL, PHILIP M. STERN, ARNOLD SAGALYN and CLAYTON FRITCHEY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*, and ROGER W. WHEELER, ET AL., *Intervenors.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Northern Virginia Sun Publishing Company, a co-partnership composed of George W. Ball, Philip M. Stern, Arnold Sagalyn and Clayton Fritchey, Petitioner above-named, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on January 30, 1962.

CITATIONS TO OPINION BELOW

The opinion of the Court of Appeals, printed in the Appendix hereto, *infra*, p. 20a, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Did the Congress of the United States, in adding § 2112 to the Judicial Code in 1958, intend to provide, in proceedings to review orders of the National Labor Relations Board, for a "race to the courthouses" of the Court of Appeals of the District of Columbia and the Court of Appeals of the circuit in which the unfair labor practices occurred, and to organize the race in such a manner that, where all parties are equally diligent and swift, the District of Columbia Circuit will always be the winner, and review of National Labor Relations Board orders in the Court of the circuit in which the unfair labor practices occurred will be effectively eliminated?

When two petitions for review of a National Labor Relations Board order are filed at different times on the same day, one in the District of Columbia, the other in the circuit where the unfair labor practices occurred, is the proceeding "first instituted" to be determined on a "time clock" ("hour and minute") basis, or should both petitions be deemed filed simultaneously and should precedence be given to the circuit in which the unfair labor practice took place?

ACTS OF CONGRESS INVOLVED

The Acts of Congress involved are—

(1) Section 2112 of the Judicial Code, Act of August 28, 1958, 72 Stat. 941, 28 U.S.C. § 2112.

(2) Sections 10(e) and (f) of the National Labor Relations Act, as last amended September 14, 1959, 73 Stat. 544, 29 U.S.C. §§ 160(e) and (f).

The full text of these Acts is set forth in the Appendix, pp. 34a-37a, *infra*.

STATEMENT OF THE CASE

Petitioner, in 1959, was the publisher of a newspaper, known as the Northern Virginia Sun, published in Arlington, Va. Petitioner did no business and had no office in the District of Columbia. (App. p. 21a)

In the year 1959 the General Counsel of the National Labor Relations Board filed twenty-eight separate charges of unfair labor practices against Petitioner on behalf of twenty-eight of its employes. Each of the twenty-eight charges asserted unfair labor practices, alleged to have occurred in Virginia, and no allegation was made of any unfair labor practice in the District of Columbia. The twenty-eight cases were consolidated for the limited purpose of a joint hearing. (App pp. 1a, 21a)

Following the normal course of such proceedings, the matter ultimately came before the Board for its decision. On December 6, 1961, the Board notified counsel for all parties that its decision and order would be handed down at 10:00 A.M. Eastern Time on December 7, 1961 at 1717 Pennsylvania Ave., N. W., Washington, D. C., the main offices of the Board. Counsel for Petitioner, counsel for the twenty-eight employees and a representative of the General Counsel's office, all appeared at the designated time and place to receive a copy of the decision and order. (App. pp. 1a, 2a)

Counsel for Petitioner, exercising maximum diligence, telephoned the Clerk of the Court of Appeals of the Fourth Circuit in Richmond, Va. at 10:15 A.M. (the circuit in which the labor practices took place) to inquire how late that day the courthouse would be open to receive a petition for review under § 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f). Counsel for Petitioner then proceeded to prepare a petition for review, in conformity with the Rules of the Court of Appeals for the Fourth Circuit, which was completed, taken to Richmond and filed on the afternoon of December 7, 1961. (App. pp. 2a, 21a)

However, at 10:50 A.M. on that same morning, i.e. 50 minutes after the delivery of the decision at the offices of the Board, counsel for the twenty-eight employes filed a petition for review in the Clerk's office of the Court of Appeals for the District of Columbia Circuit in Washington. (App. pp. 2a, 21a)

The Assistant General Counsel of the Board thereafter informed counsel for Petitioner that the Board considered that the proceedings for review had been "first instituted" in the District of Columbia, within the meaning of § 2112(a) of the Judicial Code, because the "hour and minute" of filing was the earlier. (App. p. 3a)

Counsel for the Petitioner was of the opinion that, under § 2112(a), the proceeding in the Fourth Circuit had been "first instituted". This result followed from the fact that, simultaneously with the adoption of § 2112(a), the Congress amended §§ 10(e) and (f) of the National Labor Relations Act, and accordingly all three sections had to be read together. In the light of the Congressional intent in § 10 of the National Labor Relations Act to give preference to the Circuit in which the unfair labor practices took place as against the District of Columbia, any "race to the courthouses" under § 2112(a) must take place under conditions of fairness and equality, with equal opportunity to both sides to exercise the statutory choice of venue. Accordingly, when both sides are equally diligent and both petitions are filed the same day, they are to be deemed filed simultaneously and the Congressional intent to favor local proceedings in the Circuit in which the unfair labor practices took place will resolve the tie in favor of that Circuit.

However, the Assistant General Counsel of the Board further stated that the Board intended to file the record in the Court of Appeals for the District of Columbia Circuit, unless directed otherwise. (App. p. 7)

Under the combined language of § 2112(a) and §§ 10(e) and (f) of the National Labor Relations Act, both the District of Columbia and the Fourth Circuit had jurisdiction of the proceedings for review, until the Board filed its record in one of them, following which the other Court automatically would lose its jurisdiction over the review. Therefore, if Petitioner permitted the Board to file the record in the District of Columbia Circuit, that act of the Board would oust the jurisdiction of the Fourth Circuit. In order to protect the jurisdiction of the Fourth Circuit from being ousted by the administrative action of the Board, Petitioner promptly filed a petition for a writ of mandamus in the Fourth Circuit, the Court below. The petition requested the Court below to order and direct to Board to file its record with the Court below, as the Court in which the review proceedings were "first instituted". (App. pp. 3a-8a, passim)

The Board responded to the petition for mandamus on the merits. Counsel for the twenty-eight employes intervened generally and responded to the petition for mandamus on the merits. (App. pp. 9a, 15a)

Full oral argument took place on January 10, 1962. On January 30th, the Court below denied the petition for mandamus.

The Court below decided the question on its merits. It recognized that the Petitioner had acted with exemplary diligence, and further recognized that, as a practical matter, a race from the National Labor Relations office in Washington to the Clerk's office of the District of Columbia Circuit and to the Clerk's office in Richmond could never be won by the latter. It recognized that this would mean a concentration of review proceedings of National Labor Relations Board orders in the District of Columbia. It further found that this was the Congressional intent in adopting § 2112(a) of the Judicial Code and that the Congress had intended a "fixed rule of thumb", based on the hour and minute of time of filing.

The Court below rejected the existence of any Congressional preference for the review of Board orders in the Circuit where the unfair labor practices took place. It rejected the concept that both the employer and the employes should have fair and equal opportunity to choose the forum for review, on fair and equal terms. It conceded that the National Labor Relations Act forbids the Board from dragging an employer, large or small, from anywhere in the United States to Washington for proceedings in the Court of Appeals. To the contrary, it construed the Act to permit a Union or an employe to do the very act which the Board is forbidden to do. (Opinion, App. pp. 20a-31a)

REASONS FOR GRANTING THE WRIT

1. This petition presents a case of first impression. The case in the Court below sought, for the first time, the interpretation of the Act of Congress of August 28, 1958, which simultaneously added § 2112 to the Judicial Code and amended §§ 10(e) and (f) of the National Labor Relations Act. The case is one of first impression in this Court.

The Court below dealt with the questions upon their merits and dealt squarely with the meaning and application of the Act of Congress. The issue was properly raised through a proceeding for mandamus below; there is no other procedural device available. In the absence of mandamus, the Board will file its record in the District of Columbia Court. This act of filing the record under the explicit wording of the Act, fixes the forum and the jurisdiction of the Court in which it is filed. It automatically ousts all jurisdiction of any other Court.

Further, the Court below has stated, in its Order that, as soon as the Board has filed the record in the District of Columbia,

> "the proceedings in our case . . . shall be transferred to that Court, and the Clerk of this Court is

directed to then transmit the papers to that Court in order that it may exercise jurisdiction in the case." (App. p. 33a)

A denial of certiorari in this case may, as a practical matter, be equivalent to an affirmance of the judgment below. The question can never be raised at a later stage of this case, since the filing of the record in the District of Columbia and the transfer of this case to that Court by the Court below will make the issue of statutory jurisdiction moot. All that will be left thereafter will be a right to make a *forum non conveniens* application to the District of Columbia, quite a different matter from a question of statutory primary jurisdiction. Nor can the question be raised in any subsequent case in any other fashion which would present the question to this Court in a different aspect.

2. Clearly, the question presented is of great importance in the administration of the National Labor Relations Act.

It presents to this Court the basic question of the existence or non-existence of a statutory preference (where two petitions for review are filed on the same day) for the review of Labor Board proceedings in the local Circuit where the unfair labor practices occurred, as contrasted with the concentration of such review proceedings in the District of Columbia, perhaps thousands of miles away.

It presents to this Court the question whether the Congress deliberately, in 1958, set up a system for review of Board decisions which guarantees that such reviews will be heard in the District of Columbia, and the jurisdiction of the local Circuits will have been ousted.

It presents to this Court the question whether the Congress, at the same time that it deliberately forbade the Board from forcing an employer, large or small, from coming from any point in the United States to Washington, D. C. for Court of Appeals proceedings, specifically per-

mitted any Union or employe involved in the dispute, to force the employer to do so.

It presents to this Court the question whether the Congress, when it permitted unfair labor practice proceedings to be brought against labor unions by the 1947 Taft-Hartley amendments, at the same time that it forbade the Board from forcing a union, large or small, from coming from any point in the United States to Washington, D. C. for Court of Appeals proceedings, specifically permitted an employer involved in the dispute, to force the union to do so.

It presents to this Court the question whether the Congress, in simultaneously enacting the two parallel subdivisions (e) and (f) of § 10 of the National Labor Relations Act in 1935, did so with two diametrically opposed policies with respect to the preferred forum for review.

It presents to this Court the question whether the Congress, in 1958, intended to authorize "races to the courthouses" between the employer and the Union or employe, the winner to be determined by a "fixed rule of thumb" based on the "hour and minute" of filing.

Settlement of these questions is clearly in the public interest. This problem will arise frequently as the Board continues its policy of issuing its decisions in Washington, D. C. These questions deal, in basic terms, with the distribution of review proceedings between the various Courts of Appeals.

One thing is clear. This is not a situation where the Court of Appeals of the District of Columbia has special experience and skill in dealing with specialized technical problems, so that it should be given a statutory preference or monopoly. Every Court of Appeals is equally competent to administer the review of labor litigation.

3. The decision of the Court below is believed to be erroneous, and in conflict with the Congressional intent and purpose.

Section 2112(a) of the Judicial Code was adopted for the purpose of resolving a problem which arose, inter alia, under § 10 of the National Labor Relations Act. See *e.g. Standard Oil & Gas Co.* v. *N.L.R.B.*, 116 F. (2d) 274 (CA 5th 1940); *Standard Oil Co.* v. *N.L.R.B.*, 114 F. (2d) 743 (CA 8th 1940). The problem was the conflict created when two or more different "aggrieved parties" filed petitions for review of administrative agency orders in two or more different circuits, each permissible under the Act of Congress. Prior to § 2112(a), the courts had resolved the problem by having the agency select the court which it considered most convenient to the parties. Hearings on H.R. 6682, 84th Cong., 2d Sess. 11-15 (1956). (Testimony of Judge Maris). The Congress rejected this technique and substituted in its place a rule that the court in which the proceedings were "first instituted" should have exclusive jurisdiction over the review proceedings and that review proceedings in all other courts should be transferred to it. That court also was to have the power to transfer all proceedings to some other court in its discretion, on the basis of *forum non conveniens*. H. Rep. No. 842, 85th Cong. 1st Sess. 5 (1957); S. Rep. No. 2129, 85th Cong. 2d Sess. 4 (1958).

The question here is—how shall "first instituted" be determined, in petitions to review orders of the National Labor Relations Board, in the light of the specific provisions of §§ 10(e) and 10(f) of the National Labor Relations Act?

These sections of the National Labor Relations Act are directly tied in to § 2112(a). On August 28, 1958, the President signed Public Law 85-791 of the 85th Congress, which had originated as H.R. 6788. This was a lengthy bill, with 34 Sections. Section 2 added § 2112(a) to the Judicial Code. Section 13 simultaneously amended §§ 10(e)

and 10(f) of the National Labor Relations Act, inter alia, to incorporate § 2112(a). Since 1935, § 10(f) of the National Labor Relations Act has incorporated § 10(e) by reference. This incorporation was undisturbed by the 1958 amendment.

Accordingly, the phrase "first instituted" in § 2112(a) cannot be read in a vacuum and interpreted with a simple dictionary meaning. It must be read as part of a three-part statute, i.e., consisting of § 2112(a) and §§ 10(e) and 10(f), which incorporate it and incorporate one another.

There are two equally available interpretations of "first instituted". One definition would support what may be called the "time clock" or "hour and minute" rule, i.e. that proceeding is instituted "first" which bears the earliest date stamp, no matter where filed. The other definition for which we contend, requires that "first instituted" be interpreted in the light of the statutory priorities and exclusions contained in § 10 of the National Labor Relations Act, and so as to effectuate those priorities and exclusions.

The "hour and minute" rule is deceptively attractive, but its adoption leads to consequences, which are directly contrary to the Congressional intent and purpose of the National Labor Relations Act.

The approval of an "hour and minute" rule is an open invitation to all Labor Board litigants to engage in a "race to the courthouse", to be the first to file the petition for review after the Board has issued its order. It is also an open invitation to "forum-shopping" in the District of Columbia by aggrieved parties who think they may get more favorable review treatment in that Court than in the circuit where the labor practices occurred.[1] Further, it

[1] For adverse criticism of "forum shopping" and the advantages available to large corporations and international unions, see 28 Univ. of Chicago L. Rev. 552 (1961), 8 Stanford L. Rev. 472 (1956).

operates, in actual practice to create a *preference* or *priority* in the District of Columbia which the Congress never intended.

If the race is between the District of Columbia and any other circuit in the United States, the race is a handicap race, so arranged that the District of Columbia can never lose, even if both parties are equally swift.

If the Board issues its orders in Washington, at a pre-arranged hour, as was done in the present case, it is physically impossible for one petitioner to file a petition in Richmond or in San Francisco ahead of a petition filed in Washington. The same thing is true if the Board mails out its orders and if one of the litigants has an office in Washington to receive its mail.

The advantage in favor of the District of Columbia is heightened by its local rule 38(a) which permits the petition for review to be stated "*in barest outline*", a provision which does not appear in most other circuit rules, and specifically does not appear in the Fourth Circuit rule 27(4), applicable to the present case. (See Opinion of the Court below, App. p. 25a). This local rule in the District of Columbia permits the preparation of a "barest outline" petition for review entirely *in advance* of the Board's order and permits its filing *one minute* after the issuance of the Board's order. This actually took place in the *Kobbe* case in 1961. *Local* [illegible] *U. A.W. (Kobbe Co.) v. N.L.R.B.*, Ct. of App. D.C. Nos. 15903, 15931, 47 Lab. R.R. Rep. 2669 (1961), cert. den. sub nomine *Kobbe Co. v. Local* [illegible] *U.A.W.*, 365 U.S. 869 (1961).[2]

[2] This case has been cited as an illustration of the extremes of forum shopping by a Union to compel an employer to answer in the District of Columbia where the labor practices took place in the Seventh Circuit. 28 Univ. of Chicago L. Rev. 552, 563 (1961). The District of Columbia Court *refused* an application for discretionary transfer.

The "hour and minute" rule will create a *preference* and *priority* for review proceedings in the District of Columbia, whereas § 10(f) creates no such preference or priority.

Section 10 of the National Labor Relations Act has been [redacted] the Act since its beginning in 1935. The portions with [redacted]ich we will now deal have remained unchanged since [redacted] date. Subsections (e) and (f) regulate Court of Ap[redacted]ls proceedings following a Board order. Section 10(e) [redacted]gulates the proceedings if the Board seeks an order for enforcement. Section 10(f) regulates the proceedings if a party to the litigation, other than the Board, seeks a review of the Board's order.

Section 10(e), when originally adopted in 1935 and continuously thereafter, has specifically forbidden the Board from using the District of Columbia as an alternative general forum for the filing of proceedings for enforcement in the Court of Appeals. Senator Wagner gave, as the reason for this, the intent of the Congress to "localize" such proceedings "geographically" and to forbid the Board from forcing the employer to come to Washington from anywhere in the United States for such Court of Appeals proceedings. Instead, such proceedings were to be confined to the circuit where the labor practices took place or where the party charged with unfair labor practices resided or did business.

The rule now operates equally with respect to Unions and individual employees since the Taft Hartley amendments in 1947. The Board is equally forbidden from forcing a Union or employee, who is the party charged by the Board with unfair labor practices, from coming to Washington from Hawaii or Alaska for enforcement of a Board order.

The Court below conceded the correctness of this statement of legislative history and legislative policy, finding "ample support" in the legislative history" and finding that "its merit is obvious". (Opinion, App. p. 28a)

Section 10(f) differs from § 10(e). It does not exclude the District of Columbia court as a permissible place in which any "person aggrieved" might file a petition for the review of the Board's order. However, it is unanswerably clear that the Congress did *not* intend the District of Columbia to be the *preferred* Court for initial jurisdiction.

The order of listing excludes such a priority. The Court where the labor practices take place is stated first; the residence or place of business of the party charged is stated second; the District of Columbia is stated last. We need not speculate whether this indicates a Congressional preference in the order stated, or whether it means that all three are equal. Certainly, it does *not* mean a priority for the District of Columbia.

Further, § 10(f) specifically incorporates § 10(e) by reference. It provides that, after such a petition for review has been filed, the court may enter a decree of enforcement "in the same manner as in the case of an application by the Board under subsection (e) of this section". Subsection (e), of course, is the subsection under which the District of Columbia is wholly excluded as a permissible court unless it qualifies as the place where the labor practices occurred or as the residence or place of business of the party charged.[1] Did the Congress intend, in subsection (f), immediately following subsection (e), to state the antithetical policy respecting jurisdiction? The Court below answered "yes". (Opinion, App. p. 29a)

The Court below, in the face of the specific § 10(e) prohibition on the Board, had no difficulty in finding that there was no parallel prohibition in § 10(f) upon an employer, a Union or an employee. The Court below found it entirely consistent with the legislative purpose to permit any one of them, in review proceedings, to do exactly what the Board was specifically forbidden to do. Accordingly,

[1] *International Ladies Garment Workers Union v. N.L.R.B.*, 225 F. 2d 923 App. D.C. 1955.

a powerful Union can require a small employer to come to Washington from Hawaii or Alaska for review proceedings of alleged unfair practices that took place in Hawaii or Alaska; a giant employer can require a small Union or a single employee to come to Washington from Hawaii or Alaska for review proceedings, under similar circumstances. . . .

Accordingly the Court below sustained the extraordinary proposition that: (1) The Board is specifically *forbidden* to proceed *directly* in the District of Columbia Court under § 10(e) (2) The Board is specifically *permitted* to proceed *indirectly* in the District of Columbia Court by cross-claim, and a *preference* or priority is granted for such indirect proceeding under § 10(f).

The petitioner urged upon the Court below an interpretation of § 2112(a) that easily resolved any question of conflict between § 2112(a), § 10(e) and § 10(f). Petitioner suggested that, whenever two petitions were filed on the same day for review of a Labor Board decision, one of which was filed in the circuit where the labor practices occurred and the other of which was filed in the District of Columbia, which, under § 10(e) was ineligible in the particular case as a forum for review, they should be deemed filed simultaneously and preference should be given to the circuit where the labor practices occurred. Petitioner pointed out, in both the brief and the oral argument in the Court below, how this simple solution would resolve all questions and avoid any conflict with the Congressional purpose.

The Court below rejected this interpretation. (Opinion, App. pp. 27a, 28a).[1] The Court below gave several reasons in support of its decision.

First, it concluded that the District of Columbia would, on application, transfer the cause on the ground of *forum*

[1] See the statement of the rule in Re Susquehanna Chemical Corp., 81 F. Supp. 1 (W.D. Pa. 1948), aff'd 174 F. 2d 782 (3d Cir. 1949). The application or non-application of the rule is governed by the principle of "manifest injustice" in the result.

non conveniens, so that any evil consequences would be eliminated. (Opinion, App. pp. 29a-30a) The Court below overlooked the fact that the small employer or the small union, in such a situation, must still come to Washington to make the application for transfer and must engage Washington counsel to do so. It makes little difference whether he must come to Washington for a full-dress review or for the purpose of asking for a discretionary transfer which the District of Columbia Court, in its discretion, may or may not grant.[5]

Second, the Court suggested that, where the District of Columbia is given the preferential position in review proceedings and all cases go into that Court, "the only party being inconvenienced is the Board". (Opinion, App. p. 30a) The fact is the exact opposite.[6] The Board is delighted. Its principal office is in Washington. Its appellate legal staff is in Washington. It is given the privilege in § 10(f), by cross-claim, to seek enforcement in the District of Columbia, a privilege specifically denied to it by § 10(e). (See pp. 13, 14, *supra*).

It is easy to understand how the Board would welcome such a situation. It is impossible to understand how this situation would result in the Board being "inconvenienced".

Third, the Court said (Opinion, App. p. 27a):

> "Were we to adopt the company's reading of the section, the congressional purpose of determining with time-clock precision who shall decide which forum is the most convenient to the parties would be frustrated when two or more petitions are filed on the same day. In such a case, *each court could decide that it was the most suitable, precipitating an unseemly contest*". (emphasis supplied)

[5] See e.g. *Kobler*, page 11, *supra*

[6] See 28 Univ. of Chicago L. Rev. 552, 563 (1961)

The statute excludes such dire results. Under no circumstance, can more than one court make a decision on the question of convenience. The only issue is—which Court shall make that decision? If the "hour and minute" rule applies, the District of Columbia Court will make the decision, because it will be "first" and will have the primary and exclusive jurisdiction over the review proceedings. If the "hour and minute" rule does not apply, the Fourth Circuit will make the decision, because it will be "first" and will have the primary and exclusive jurisdiction over the review proceedings. Under no circumstances, can there be "an unseemly contest".

Fourth, the Court below held that the "hour and minute" rule should apply in the present case, because it would properly apply to the situation in which the two petitions were filed in the circuit where the labor practices took place and the circuit where the party charged resided or did business. (Opinion, App. p. 31a) The two situations are totally different.

The Congress, in § 10(e), specifically authorized the Board to proceed, at its option, to seek enforcement in either the circuit of the labor practices or the circuit of residence or doing business. Both circuits are equally eligible. If the two petitions are filed in those two circuits, both are proper and on an equal basis. As between these two circuits, an "hour and minute" rule fits the Congressional intent.

However, the District of Columbia stands on a different footing. If the contest is between that Court and the circuit of the labor practices or the circuit of residence or doing business, the contest is between two courts which the Congress in § 10(e) has placed on two different levels; one is authorized as the proper court; the other is prohibited.

Clearly a different rule of choice can prevail if the contest is between two courts established on the same level

or if the contest is between two courts, one of which is authorized, the other of which is prohibited.

The solution proposed by the petitioner here conforms to Congressional policy. If petitions are filed on the same day in two circuits, one of which is eligible under § 10(c) and the other of which is ineligible under § 10(c), then both petitions shall be deemed filed simultaneously and preference shall be given to the eligible circuit. On the other hand, if both circuits are equally eligible under § 10(c), the "hour and minute" priority rule may be applied.

This solution excludes a preference and priority for the District of Columbia for review of Labor Board orders which the Congress did not intend. It conforms to the Congressional intent to differentiate between the position of the District of Columbia and the position of the circuits where the labor practices occurred and the party charged resides or does business. It avoids the travel from all over the United States by unions and employers to Washington which Congress disapproved. It minimizes "forum-shopping" in the District of Columbia. It will minimize applications for transfer on the ground of *forum non conveniens*. It will be a rare case in which there will be a forum more convenient to the parties than the place where the labor practices have occurred or where the party charged resides or does business.

The important questions of the administration of the National Labor Relations Act, presented in this petition, are novel and are raised for the first time in this case. They have never before been presented to this Court.

This case bears no resemblance to *Kohler* (*Kohler Co.* v. *Local* [illegible], *I.U.A.W.*), in which certiorari was refused by this Court on April 3, 1961, 365 U.S. 820.

In *Kohler*, the Board filed its record in the District of Columbia Court. The exclusive jurisdiction of the District

of Columbia Court was admitted by all parties. The only question presented in the *Kohler* petition for certiorari was the correctness of the District of Columbia's refusal to transfer the cause on the ground of *forum non conveniens*. (See Kohler Pet. for cert. "Question Presented", "Conclusion".)

This case is the exact opposite. No court has, as yet, acquired exclusive jurisdiction. No question of *forum non conveniens* or of transfer of the cause is presented. Instead, this petition presents the question of selecting the proper Court to acquire exclusive jurisdiction, under the rules of selection laid down in the combined provisions of § 2112(a) and §§ 10(e) and (f).

CONCLUSION

For the reasons above set forth, it is respectfully requested that a writ of certiorari be granted.

Respectfully submitted,

PHILIP W. AMRAM
GILBERT HAHN, JR.
944 Washington Building
Washington, D. C.

Counsel for Petitioner

AMRAM, HAHN & SUNDLUN
944 Washington Building
Washington, D. C.

Of Counsel

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

GEORGE W. BALL, PHILIP M. STERN, ARNOLD SAGALYN and CLAYTON FRITCHEY, t. A NORTHERN VIRGINIA SUN PUBLISHING COMPANY, *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

Petition For Writ of Mandamus

The petition of George W. Ball, Philip M. Stern, Arnold Sagalyn and Clayton Fritchey, for a writ of mandamus to the National Labor Relations Board (hereinafter called "NLRB") and its appropriate officers respectfully represents:

1. Prior to December 7, 1961, the NLRB had before it for decision 28 separate cases filed in 1959 by the General Counsel of the NLRB following the filing of 28 separate and individual charges of unfair labor practices filed by 28 former employees of your Petitioners. Said 28 individual cases (Case No. 5-CA-1308 et al) were consolidated by the NLRB for the limited purpose of a joint hearing only.

2. On December 6, 1961, the NLRB notified all counsel for all parties to said proceedings that its decision and order therein would be handed down at 10:00 o'clock A. M., Eastern Time, on December 7, 1961, at 1717 Pennsylvania Avenue, N. W., Washington, D. C., the main offices of the NLRB. Counsel for Petitioners appeared at the designated time and place to receive a copy of the decision and there were also present representatives of the office of General Counsel of the NLRB and counsel for the 28 individual charging parties who had filed the 28 separate individual charges. The said order of the NLRB is

captioned "Petition for Review of a Decision and Order of the National Labor Relations Board" and is cited as 134 NLRB No. 109. A complete copy thereof was attached as an exhibit to the petition for review thereof filed by your petitioners in this Court under No. 8512 and now of record in the Clerk's Office of this Court.

3. At 10:15 A.M. Eastern Time on December 7, 1961 one of the attorneys for your Petitioners telephoned to the Clerk of this Court to ascertain the time when the Clerk's Office would be open and to advise the Clerk that a Petition for Review of the order of the NLRB was in preparation and would be filed that day, all as set forth in the affidavit of Mark B. Sandground, Esq., attached hereto and made a part hereof.

4. Later that day, December 7, 1961, your petitioners filed their petition for review of the Order of the NLRB which was assigned number 8512 by the Clerk of this Court. No time of day of the filing of the petition was noted on the record in the Clerk's Office of this Court.

5. On the same day, December 7, 1961, a paper purporting to be a Petition for the Review of the same Order of the NLRB was filed in the United States Court of Appeals for the District of Columbia Circuit (hereinafter referred to as the "D. C. Circuit") in the name of the 28 separate individuals who had been the charging parties before the NLRB and which was signed by Seymour Spelman, Esq., discribing himself as "counsel for charging Parties and Petitioners". No Petitioner therein signed or swore to the said alleged Petition for Review. Said Petition was assigned No. 16,757 in the D. C. Circuit. A 10:50 A.M. time of filing is noted on the petition of record.

6. The Order of the National Labor Relations Board (which appears in full at pages 8-11 of the "Exhibit" attached to and made a part of Petitioners' Petition for Re-

view under No. 8512 of this Court), provides in summary that your Petitioners shall do the following:

(1) Cease and desist from discriminating in regard to hire or tenure of union employees.

(2) Cease and desist from interfering with its employees in the exercise of the right of self-organization and to engage in other concerted activity.

(3) Upon application to offer reinstatement to 21 employees, in the manner prescribed and to make them whole in accordance with "The Remedy" part of the Order.

(4) Offer 3 employees immediate and full reinstatement and make them whole in the manner set forth in "The Remedy" section of the order.

(5) Preserve all payroll records.

(6) Post a prescribed form of notice at the Plant, in conspicuous places, for 60 days.

7. Mr. Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, has notified Petitioners' Counsel that the National Labor Relations Board has determined that under 28 USC Section 2112(a) that petition for review of the Board's Order was "first instituted in the District of Columbia Circuit and that the NLRB will on January 16, 1962 file with the said District of Columbia Circuit under that Circuit's No. 16,757 the record of the aforesaid National Labor Relations Board proceedings. Your petitioners are informed that the said NLRB will assert that petition was physically filed in the District of Columbia Circuit December 7, 1961 several hours before the Petition in this Court on that same day.

8. Until the record of the National Labor Relations Board proceeding is filed with the District of Columbia Circuit, this Court continues to have jurisdiction of this

cause. Upon the filing of the record of the said National Labor Relations Board proceedings with the District of Columbia Circuit, this Court will be obligated by 28 USC Section 2112(a) to surrender its jurisdiction of this cause and to transfer to that Court the proceedings with respect to the Review of the NLRB Order. Thereafter, the matter may not be transferred back to this Court except in the discretion of the District of Columbia Circuit. If this Court permits the NLRB to file said record in the D.C. Circuit on January 16, 1962, this Court will have permitted an administrative agency, by its own fiat, to oust the jurisdiction of this Court without control or decision by this Court.

9. Mr. Marcel Mallet-Prevost, the said Assistant General Counsel, National Labor Relations Board, has advised Counsel for Petitioners that the Board regards its determination to file the record in the District of Columbia Circuit as set forth in paragraph 7 above, as "ministerial" and not the "exercise of discretion" on the part of the Board or its officers.

10. Your Petitioners consider that this "ministerial" determination of the National Labor Relations Board and its officers is wrong and in violation of the Act of Congress. The record of the NLRB proceedings should be filed with this Court, under No. 8512 and the relief prayed for by your Petitioners herein should be granted for the following reasons:

(a) The Congress did not intend in 28 USC 2112(a) that there could be a priority of hours or minutes between two petitions for review filed in separate Circuits on the same day. To the contrary, Congress intended that, if two petitions were filed on the same day in separate Circuits, they should be deemed to have been filed simultaneously. In support of this statement, Petitioners submit the following:

(1) 29 USC 160 (f) permits a petition for review of an NLRB Order to be filed in any one of three Circuits, in the following order, (a) the place of the alleged unfair labor practices, (b) the residence or place of business of the aggrieved person filing the petition, and (c) the D. C. Circuit.

(2) If there be any statutory priority between these three Circuits, the D. C. Circuit will have third priority by virtue of its chronological listing. If there be no priority intended by statute, then *equal* opportunity must be granted to aggrieved persons to file in any of the three Circuits.

(3) The procedure adopted by the NLRB for the issuance of its Orders in Washington, D. C. in combination with the "hour and minute of filing" priority theory of the NLRB in this case operates to repeal the Act of Congress and is therefore illegal and void.

(4) The issuance of the NLRB Order in Washington, D. C. in this case at 10:00 A.M. Eastern Time in conformance with the Board's customary procedures in such cases renders it physically impossible for aggrieved persons located in any Circuit other than the D. C. Circuit to file a petition in the Circuit of their choice ahead of a petition to be filed by another aggrieved person in the D. C. Circuit.

(5) The Court of Appeals of the D. C. Circuit has heretofore approved the filing by one aggrieved person of a skeleton petition for review containing no detailed grounds of review and filed one minute after the issuance of the NLRB Order and has held that this ousts the jurisdiction of all other Courts of Appeals throughout the Country. *NLRB v. Kohler Company*, CA DC No. 16,031, decided November 23, 1960, reported in CCH 42 Labor Cases 16,783.

(6) In the instant case, the utilization of the "hour and minute" priority theory would have effectually destroyed any equal statutory right of an aggrieved person located in any circuit located in the Mountain Time or Pacific Time zones to file a petition for review as specifically permitted by the Act of Congress, since the 10:00 A.M. Eastern time release time would be 7:00 A.M. in the Pacific Time zone and 8:00 A.M. in the Mountain Time zone and the Clerk's Offices there would not yet be open in those Courts, whereas the Clerk's Office was open in the District of Columbia Circuit in Washington, D. C. to receive an immediate petition for review in that Court.

(7) Further, if the "hour and minute" priority theory is approved, the device used and approved in *Kobler* of filing a skeleton petition in Washington, D. C. one minute after the issuance of the NLRB Order will effectuate by judicial decision a repeal of the Act of Congress and will amend the same to provide that all petitions for review shall be filed in the D. C. Circuit only.

(8) The "hour and minute" priority theory is also illegal for another reason. Under 29 USC 160(e), a proceeding by the NLRB for the enforcement of its order can not be brought in the D. C. Circuit if the unfair labor practices have taken place in another circuit but may be filed only in the circuit in which those practices have taken place. However, if a petition for review is first filed in the D. C. Circuit by an aggrieved person the NLRB by way of counterclaim to the petition for review may demand enforcement of its order in the D. C. Circuit. The release of its orders in Washington, D. C. plus the application of the "hour and minute" priority theory rule and the "one minute after" procedure approved in *Kobler* again operates to repeal the Act of Congress by providing

an easy administrative device by which the NLRB can initiate enforcement proceedings in a Circuit which the Congress has excluded as a proper forum.

(c) The "hour and minute" priority theory, being therefore void and illegal, the filing of two petitions in separate appropriate Circuits at any time of the same day must be held to be a simultaneous filing. In that case the priority should be determined in accordance with the rule of logic and good sense and as set forth in the Act of Congress, the first priority should be given to the Circuit in which the unfair practices are alleged to have occurred; in this case, in this Court.

(d) Assuming however, that the "hour and minute" priority theory is held to be a valid one, this Court should find that the petition filed in this Court was the first petition filed for the purposes of the "hour and minute" priority rule for the following reasons:

(1) The petition filed in the D. C. Circuit should be treated as procedurally defective because:

(a) It did not, as required by Rule 38 case of the Rules of the D. C. Circuit (which rule is identical in effect with Rule 27 (3) of this Court and is required by 28 U.S.C. 1651 (a)), have attached thereto copies of the NLRB Order, as it set forth in the affidavit of Ronald Rosenberg, Esq., attached hereto.

(b) The petitioner there failed to set forth as a party petitioner one Robert W. Bentley, who died September 19, 1961, as is shown by a copy of the public report of his death attached hereto.

(c) If this Court rules that all of the procedural errors in the petition filed in the D. C. Circuit are to be ignored and if informal proceedings are accepted

as compliance with the "hour and minute" priority rule, subject to the right of petitioners to file a procedurally correct petition at a later time on the same day, the oral notice of filing a petition for review given by the attorney for your Petitioners to the Clerk of this Court at 10:15 A.M. Eastern Time on December 7, 1961, followed by a procedurally correct petition, filed later that same day, should be given priority in time for purposes of the "hour and minute" priority rule.

WHEREFORE, Petitioners pray that this Honorable Court:

1. Determine that this Court has jurisdiction to review the NLRB order above described.

2. Determine that it is the duty of the NLRB to file the record of the NLRB proceedings, above described, in this Court and not in the United States Court of Appeals for the District of Columbia Circuit.

3. Issue its writ of mandamus to the NLRB and its appropriate officers, directing and commanding them to file said record in this Court.

4. Such other and further relief to which Petitioners may be entitled in the premises and to this Court may seem just and proper.

GILBERT HAHN, JR.
MARK B. SANDROUND
RONALD ROSENBERG
Attorneys for Petitioners

DISTRICT OF COLUMBIA, ss:

Gilbert Hahn, Jr., General Counsel of Northern Virginia Sun Publishing Company, being first duly sworn, deposes and says that the foregoing statements are true to his best knowledge and belief.

GILBERT HAHN, JR.
Gilbert Hahn, Jr.
General Counsel
Northern Virginia Sun
Publishing Company

SUBSCRIBED AND SWORN TO before me this 26th day of December, 1961.

ROBERT A. BARTON
Notary Public, D. C.
My Commission expires:
July 14, 1966

[Exhibits to Petition omitted, as unrelated to the issues raised on this petition.]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8512

GEORGE W. BALL, ET AL.,
T/A NORTHERN VIRGINIA SUN PUBLISHING COMPANY,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Memorandum of The National Labor Relations Board In Response to Petition for Writ of Mandamus

To the Honorable, the Judges of the United States Court of Appeals for the Fourth Circuit:

On December 26, 1961, petitioners herein filed a petition for writ of mandamus to order the Board to file the record in this case in this Court and not in the United States Court of Appeals for the District of Columbia Circuit. On De-

cember 27, 1961, by order signed by Sobeloff, Chief Judge, the Board was ordered to appear in this Court on January 10, 1962, to show cause why a writ of mandamus should not issue.

The facts are accurately set forth in the petition for writ of mandamus and may be summarized as follows:

On December 7, 1961, the Board issued its Decision and Order in *George W. Ball, et al., t/a Northern Virginia Sun Publishing Company*, 134 NLRB No. 109. On that day, the charging parties before the Board filed a petition for review of this order in the United States Court of Appeals for the District of Columbia Circuit, being styled *Roger W. Wiegler, Jr., et al. v. N.L.R.B.*, No. 16,757. On the same day, respondents before the Board, petitioners herein, filed in this Court a petition for review of the same order. The Board has been informed by the Clerks of the Courts of Appeals for the Fourth Circuit and for the District of Columbia Circuit that the petition for review in the above entitled proceeding was filed subsequent in time to the petition for review filed in the District of Columbia Circuit. Pursuant to 28 U.S.C., Sec. 2112(a), it is the Board's intention, unless it is directed to do otherwise, to file the certified list (in lieu of the certified record) in the District of Columbia Circuit, said certified list being due in that Court on or about January 16, 1962.

The controlling statute (28 U.S.C., Sec. 2112(a)) provides:

> If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency . . . concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court may there-

after transfer all the proceedings with respect to such order to any other court of appeals.

Thus, the Board is specifically directed to file the record in the court in which the proceeding was "first instituted." The Board has no discretion in this matter; the legislative history of Section 2112(a) shows that Congress deliberately withheld such discretion from the agencies. See 103 Cong. Rec. 13018; H. Rep. No. 842 on H.R. 6788, 85th Cong., 1st Sess., pp. 4-5; hearing before Subcommittee No. 3 of the Committee on the Judiciary, House of Rep., 85th Cong., 1st Sess., on H.R. 6788, pp. 11-12, 38-39. Were the Board to file the record in this case in any court other than that in which the proceeding was "first instituted," its action would be contrary to the statutory mandate and subject to reversal, perhaps by writ of prohibition or writ of mandamus. See *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318.

This issue of multiple filing has arisen in three recent cases: In *Local 833, UAW v. N.L.R.B. (Kohler Co.)*, 47 LRRM 2689 (November 23, 1960), certiorari denied, 365 U.S. 869, the District of Columbia Circuit denied the Company's motion to transfer, although the Company's petition for review had been filed in the Seventh Circuit only 25 minutes after the Union's petition for review had been filed in the District of Columbia Circuit. Similarly, the Court denied the Company's motion to transfer in *International Union of Brewery Workers v. N.L.R.B. (Hatt*

[1] As noted above, the charging parties' petition for review was filed in the District of Columbia Circuit on the same day as, but prior in time to, the Company's petition for review in this Court. The Company urges (petition for writ, pp. 5-8) that the priority in time within the same day should be disregarded as contrary to the intent of Congress. However, this division of the judicial day appears to be precisely what the law requires in cases where priority of time is of the essence as between two competing parties both of whom take the required action on the same day. This is established in a number of cases, some of which are cited and quoted in an appendix attached hereto.

Battlers, Inc., 47 LRRM 2688 (C.A.D.C., October 3, 1960). Compare, however, *Local 3674, Carpenters* v. *N.L.R.B.* *Butcher Boy Refrigeration Door Co.*, where the District of Columbia Circuit, in deciding the issue of venue pursuant to 28 U.S.C., Sec. 2112(a), granted the Company's motion and ordered the case transferred to the Seventh Circuit. 47 LRRM 2688 (C.A.D.C., September 16, 1960).

Respectfully submitted,

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

MELVIN J. WELLES,
WARREN M. DAVISON,
Attorneys,
National Labor Relations Board.

January 1962.

APPENDIX OF AUTHORITIES ESTABLISHING THAT PRECISE TIME OF FILING CAN BE CONTROLLING

Louisville v. *Savings Bank*, 104 U.S. 469, 474, quoting *Greenleaf* v. *Mayll*, 37 Ill. 230:

> It is true that for many purposes the law knows no division of a day; but whenever it becomes important to the ends of justice, or in order to decide upon conflicting interests, the law will look into fractions of a day, as readily as into the fractions of any other unit of time.

Tower v. *Stimpson*, 175 Fed. 130, 130-131 (D. Mass.):

> The defendant contends . . . that the filing of the two papers must be treated as simultaneous, because

the court disregards fractions of a day. . . . That justice and the convenience often require a court to notice the hour as well as the day of filing is illustrated by the case at bar. The complainant had a right to dismiss his bill. The defendant might defeat that right at any time by filing a crossbill which prayed for affirmative relief; but he might not defeat the complainant's right by a bill filed after the motion [to dismiss] was made. . . .

South Carolina National Bank v. *Gaud*, 232 S.C. 367, 102 S.E. 2d 215, 218:

Appellant also takes the position that, inasmuch as the two mortgages were executed on the same date, the transactions are to be construed as having transpired simultaneously, in that the term 'date' embraces the whole day and fractions thereof are not considered in computation of time. . . . An exception to this rule, however, arises when it becomes necessary to determine the rights of rival lien claimants.

German Security Bank v. *Campbell*, 99 Ala. 249, 12 So. 136:

. . . this court, while recognizing the general doctrine . . . that the law takes no account of the fractions of a day, has declared 'that the same rule does not apply to statutes which, as between different acts, give a preference or priority to the one which is first done; and in such cases, courts will regard the fractions of a day.' *Lowe* v. *Phillips*, 27 Ala. 311.

Clark v. *Citizens Bank of Collingswood*, 118 A. 2d 108, 112, 38 N.J. Sup. 69:

. . . the law will take cognizance of the actual hour of time of the occurrence of an event or the performance of an act where the exact hour of such occurrence or performance is important in fixing of relative rights and in the interest of doing justice.

In the Matter of Joseph Richardson, 2 Story 571, Justice Joseph Story stated:

So that we see that there is no ground of authority, and, certainly, there is no reason to assert that any such

general rule prevails, as that the law does not allow fractions of a day. On the contrary, common sense and common justice equally sustain the propriety of allowing fractions of a day when never it will promote the purposes of substantial justice.

Ann. Cas. 1914 C 95, 97, *Fractions of Day in Computation of Time*:

It has been held in a number of cases that in computing the time when legal papers were filed the fractions of a day must be noticed, if priority of filing is in question.

2 Blackstone's Comm. 140 notes:

But though the law does not in general allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish for the purposes of justice; and I do not see why the very hour may not be so too where it is necessary and can be done, for it is not like a mathematical point, which cannot be divided. Per Lord Mansfield, 3 Burr. 1434, 2 East 154. 3 Coke Rep. 30, a. Therefore fraction of a day was admitted in support of a commission of bankruptcy, by allowing evidence that the act of bankruptcy, though on the same day, was previous to issuing the commission. 8 Ves. 30. So where goods are seized under a *fieri facias* the same day that the party commits an act of bankruptcy, it is open to inquire at what time of the day the goods were seized and the act of bankruptcy committed; and the validity of the execution depends on the actual priority. 4 Camp. 197. 2 B. & A. 586.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8512

GEORGE W. BALL, PHILIP M. STERN, ARNOLD SAGALYN and CLAYTON FRITCHEY, t/a NORTHERN VIRGINIA SUN PUBLISHING COMPANY, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Opposition of Intervenors to Petition for Writ of Mandamus

To The Honorable, the Judges of the
United States Court of Appeals
for the Fourth Circuit

I. STATEMENT OF FACTS

At 10 a.m., December 7, 1961, pursuant to one day's notice, the National Labor Relations Board handed to counsel for petitioners (respondents before the Board), counsel for intervenors (charging parties before the Board), and representatives of the Board's General Counsel copies of its Decision and Order in which it found petitioners guilty of certain unfair labor practices as alleged in its Complaint and dismissed the Complaint as to certain others. At 10:50 a.m. the same day, intervenors filed a Petition for Review of the Board's Decision and Order in the District of Columbia Circuit. (Petition attached hereto as Appendix "A".) Later that same day, petitioners filed their Petition for Review in this Court. (Affidavit of Seymour J. Spelman, Esquire, attached hereto as Appendix "B".)

On December 26, 1961, petitioners filed the present Petition for Writ of Mandamus seeking to compel the Board to file the record of its proceedings in this Court in order that the review of the Board's Decision and Order will be

heard here and not in the District of Columbia Circuit where a Petition for Review was first instituted.

II. STATEMENT OF ARGUMENT

Petitioners' argument is based on two main points, both plainly incorrect in fact and in law.

* * * * * * * * * *

(Part A omitted; this point unrelated to the issues raised in this petition)

B. The argument that petitioners' petition for review should be deemed to have been filed simultaneously with intervenors' petition

It is acknowledged that intervenors' petition was filed in the D.C. Circuit several hours before petitioners' petition was filed in this Court. In such circumstances, the law is settled that jurisdiction to hear the cause is in the court where the petition is first filed, subject to the discretion in *that* court to transfer the cause to any other court of appeals "For the convenience of the parties in the interest of justice." 28 U.S.C. Sec. 2112(a); *Local 833, UAW* v. *N.L.R.B. (Kohler Co.)*, 47 LRRM 2609 (Nov. 23, 1960), cert. denied, 365 U.S. 869, C.A.D.C.; *International Union of Brewery Workers* v. *N.L.R.B. (Gulf Bottlers, Inc.)*, 47 LRRM 2688 (C.A.D.C. Oct. 3, 1960). And this is so whether the first petition is prior in terms of hours on the same day or in terms of a longer period. *Local 833, UAW* v. *N.L.R.B.*, supra.

Petitioners' assertion that "Congress intended that, if two petitions were filed on the same day in separate circuits, they should be deemed to have been filed simultaneously" has no support, neither in the statute, in case law nor in the legislative history; and indeed petitioners cite no authority for their proposition. On the contrary, the cases and the legislative history demonstrate a contrary intention which will no doubt be noted to the Court in

the responsive pleading filed by the Board's General Counsel.

Petitioners claim that the "hour-minute" priority rule is potentially unfair because in certain circumstances it can have the effect of denying to one of the parties equal opportunity to file first in the circuit of its choice. This potentiality does exist, and Congress has provided a remedy for it. But the remedy is neither a Petition for Mandamus nor is it any kind of petition addressed to the court where the later petition was filed.

Title 28 U.S.C., Sec. 2112(a) provides that where proceedings have been instituted in two or more courts, that court in which the proceeding was "first instituted" has the discretion to "transfer all the proceedings with respect to such order to any other court of appeals" . . . "for the convenience of the parties in the interest of justice".

Thus, if convenience and justice do require that this cause be heard in the Fourth Circuit and not in the D.C. Circuit, the proper and only forum to raise the issue is in the D.C. Circuit where an adequate remedy has been afforded by statute. The Petition for Mandamus is thus faulty on two counts: it is addressed to the wrong forum and an adequate alternative remedy exists.

The D.C. Circuit is sensitive to the demands of convenience and justice in the proper circumstances, as evidenced by its action in transferring the proceedings in *Local 2677, Carpenters v. N.L.R.B. (Butcher Boy Refrigeration Door Co.)*, 47 LRRM 2688, from the D.C. Circuit where the petition for review was first filed to the Seventh Circuit.

But, it may be noted that in the present case there is not a single circumstance which would justify the transfer from the D.C. Circuit to this Court. All of the parties and all of the attorneys live in the District of Columbia or in the Metropolitan Washington area. The company's plant

is located in the Metropolitan Washington area and the newspaper it publishes is circulated there. And the union which represents all the employees involved in the proceeding has its office in the District of Columbia. Literally, there is not a single person involved in this cause who lives within 100 miles of this Court; everyone involved is within a short ride to the D.C. Circuit Court building."

Thus, even if we were to grant arguendo that a Petition for Mandamus is an appropriate remedy, that this court is the proper forum to hear it and that the two petitions be deemed to have been filed simultaneously—even granting all those factors in the petitioners' argument—no reason in convenience or justice exists for the transfer. This is not the forum conveniens.

Finally, petitioners' contention that there is a statutory priority which, in case of simultaneous filing, favors the circuit mentioned first in the statute, (i.e., the circuit in which the unfair practice occurred) has no foundation whatever—even assuming the filing here were deemed simultaneous. There is nothing in the statutory language which in any way suggests such Congressional purpose, although such purpose could easily have been expressed had it been intended. On the contrary, the notion that such a priority was intended is rebutted by Title 28 U.S.C. Sec. 2112, which states priority in terms of time, not place, and provides for the transfer to another circuit not in terms of such priority but in terms of "convenience of the parties in the interest of justice."

Wherefore, intervenors pray that the Petition for Mandamus be denied.

Seymour J. Sperrys
Seymour J. Spelman
323 South Washington Street
Alexandria, Virginia
Attorneys for Intervenors

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing Opposition of Intervenors to Petition for Writ of Mandamus, with Appendices attached, to Gilbert Hahn, Jr., Esq., counsel for petitioners, at Washington Building, Washington, D. C., and to Stuart Rothman, Esq., General Counsel of the National Labor Relations Board at 1717 Pennsylvania Avenue, N. W., Washington, D. C., on this 5th day of January, 1962.

Seymour J. Spelman
Seymour J. Spelman

[Appendices "A" and "B" to this Opposition of Intervenors omitted. Their contents are unrelated to the issues raised in this petition.]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8512

GEORGE W. BALL, PHILIP M. STERN, ARNOLD SAGALYN and CLAYTON FRITCHEY, t/a NORFOLK VIRGINIAN-PILOT PUBLISHING COMPANY, *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

to give reviewing jurisdiction to the circuit wherein the unfair labor practices occurred, and not to the District of Columbia Circuit, when petitions for review are filed on the same day in both courts. The employees and the Labor Board, on the other hand, opposing mandamus, maintain that the statute confers jurisdiction upon the court in which a petition for review is first filed, even when both petitions are filed on the same day. This view of the law the company characterizes derogatorily as the "clear and minute" rule, and urges its rejection.

The statutory provision for review of Board orders is found in section 10(f) of the National Labor Relations Act:

> "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside."

In contrast, jurisdiction of petitions by the Labor Board seeking enforcement of its orders is more restricted, in that the District of Columbia Circuit is not named as an alternative forum for review. Section 10(e) of the National Labor Relations Act provides as follows:

> "The Board shall have power to petition any court of appeals of the United States [* * *] which [* * *]

[* * *] as amended, 52 Stat. 1031, 29 U.S.C.A. [illegible] Supp. 1941.

[* * *] as amended, 52 Stat. 1031, 29 U.S.C.A. [illegible] Supp. 1941.

> labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order . . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive . . . .

This last provision, whereby the filing of the record vests that court with exclusive jurisdiction over the controversy, is applicable as well to review proceedings initiated under section 10(f).

Prior to 1958, when petitions for review were filed by different parties in more than one circuit, the Board, in choosing the court in which to file the record, determined the tribunal which would hear the case. Since 1958, however, conflicts in jurisdiction are resolved in accordance with the terms of 28 U.S.C.A. § 2112 (as of 1959), which is not limited to review of Labor Board decisions, but is applicable to the review of actions of most federal agencies. The statute in pertinent part provides as follows:

> "If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency, board, commission, or officer concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall then upon notice transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals." Emphasis supplied.

Resolution of the problem before us depends upon the meaning of the words "first instituted" in 28 U.S.C.A. § 2112(a) (1959). The view of the employees and of the Board is that, properly interpreted, the phrase "first instituted" means literally first filed, no matter how close in time the filings may be. The company, on the other hand, urges us to interpret the key words "first instituted" in light of the principle that "the law does not in general allow of a fraction of a day."[4] Applying this rule, filings occurring at different times on the same day are to be treated as happening simultaneously. The company advances the suggestion that by adopting this reading of section 2112(a) and rejecting the "hour and minute" rule, two consequences, which are not warranted by the statutes, would be avoided.

First, the company points out that the practical effect of adopting the "hour and minute" rule would be to place the District of Columbia Circuit in a preferred position as the reviewing tribunal. When the Board issues its orders in Washington at a pre-arranged hour, a party seeking review in the District of Columbia can reach the clerk's office of that court with his petition faster than one seeking review in the Fourth Circuit with its offices in Richmond, Virginia, or in the Ninth Circuit located in San Francisco, California. When the Board mails its decision to the parties, the same advantage goes to a party residing in or near the District of Columbia who desires review there if the other party is

[4] *See In re Susquehanna Chem. Corp.*, 81 F. Supp. 1, 9 (W.D. Pa. 1949), *aff'd*, 174 F. 2d 784 (3d Cir. 1949). "But this is not a universal rule to be rigidly adhered to *semper et ubique*. In the words of Lord Mansfield, "But though the law does not, in general, allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish. And I do not see why the very hour may not be so too, where it is necessary and can be done. For, it is not like a mathematical point, which cannot be divided." *Pomba v. Pitt*, 3 Burrow 1423, 1434, 97 Eng. Rep. 907, 913 (K.B. 1763); *see Louisville v. Savings Bank*, 104 U.S. 469 (1881).

more distantly located. This advantage is heightened by a recent amendment of Rule 38(a) of the District of Columbia Circuit whereby a petition need contain, as the grounds for review, only "a concise statement, *in barest outline*, of the nature of the proceedings as to which review is sought * * *." (Italics ours.) Under this provision, counsel can speedily prepare his petition. The comparable Rule 27(1) of the Fourth Circuit, for example, does not contain the phrase "in barest outline" and consequently, it is suggested, a petition, to be acceptable, must be more detailed and cannot be prepared quite so expeditiously.[1] The employer argues that this preferred position for the District of Columbia is nowhere indicated in the statutes, and suggests that rejection of the "hour and minute" rule would remedy the jurisdictional imbalance.

The second unwarranted consequence attributed by the present petitioner to the "hour and minute" rule is that it subverts the preference said to be given in sections 10(e) and (f), read together, to the circuit wherein the unfair labor practice was committed. Admittedly, the Board is not entitled, under section 10(e), to seek enforcement of its orders in the District of Columbia unless that is the place where the unfair labor practice occurred or unless the transgressing party resides or does business there. It is contended that the purposes of this restriction were to "localize Labor Board matters in the local Circuit Court" and to "prevent forcing employers to come from all over the United States into the District of Columbia." The company then imputes the same purposes to section 10(f) which permits an aggrieved party to seek review either in the local circuit or in the District of Columbia. Although a preference for the local circuit is not indicated in express

[1] Of the remaining courts of appeals, only the Third Circuit in Rule 15(1) and the Ninth Circuit in Rule 11(1) have adopted language similar to that found in the District of Columbia Rule, as a

language, the company asserts that localization is just as desirable for petitions of aggrieved parties seeking review of Board orders as it is for the Board's petitions for enforcement. And, secondly, the argument continues, there is no reason why parties petitioning for review should have the option to force their opponents to come to the District of Columbia, when this may not be done at the instigation of the Board.

The light which the legislative history sheds on section 2112(a) makes it plain that we should accept the reading of the statute which is urged on us by the employees and by the Labor Board. One of the principal concerns of Congress was the problem of inter-circuit conflicts of jurisdiction. The section originated in the Committee of Revision of the Laws of the Judicial Conference of the United States, headed by Judge Maris of the Third Circuit. As initially proposed, when petitions for review of the same agency action were filed in more than one circuit, the agency would deposit the record of the case in that court "in which in its [the agency's] judgment the proceedings may be carried on with the greatest convenience to all the parties involved."[6] It was thought that such a provision would impose an adequate standard for the agency's choice of a reviewing tribunal, and would in effect give statutory sanction to the existing practice which had been judicially developed.[7] However, the American Bar Association and several of the federal agencies objected to the provisions whereby it fell to the agency to decide which forum was

[6] H R 6682, 84th Cong., 1st Sess. § 2 (1955).

[7] See Hearing on H R 6682 Before a Subcommittee of the House Committee on the Judiciary, 84th Cong., 2d Sess. 11-15 (1956). (Testimony of Judge Maris.) For a series of cases illustrating this procedure, see *Columbia Oil & Gasoline Corp. v. S E C.*, 134 F. 2d 265 (3d Cir. 1943); *L. J. Marquis & Co. v. S E C.*, 134 F. 2d 335 (2d Cir. 1943); *L. J. Marquis & Co. v. S E C.*, 134 F. 2d 822 (3d Cir. 1943).

the most convenient." It was thought that this decision should be made by a court. Accordingly, the bill was amended to its present form so that, as the House Report points out, the court of appeals "in which the first proceeding was instituted, should have exclusive jurisdiction of all proceedings involving the same order, with authority to transfer all the proceedings to another court of appeals if that would best serve the convenience of the parties."[*]

Section 2112(a) in its present form represents a change in the law in two significant respects: first, a judgment as to what forum will be most convenient to the parties is to be made by a court and not by the agency whose order is under review; and second, the court which is to make that decision is determined by a fixed rule of thumb—it shall be that court in which the petition for review was first filed. The value of this definite and easily administered rule would be greatly diminished if the "hour and minute" test were rejected and petitions filed on the same day were considered simultaneous. Were we to adopt the company's reading of the section, the congressional purpose of determining with time-clock precision who shall decide which forum is the most convenient to the parties would be frustrated when two or more petitions are filed on the same day. In such a case, each court could decide that it was the most suitable, precipitating an unseemly contest.

But the present petitioner for mandamus proposes an alternative principle which, it says, will furnish a more satisfactory method of determining where the authority

[*] See Hearing on H.R. 6788 Before a Subcommittee of the House Committee on the Judiciary, 85th Cong., 1st Sess. 24-25 (Interstate Commerce Commission); 33-34 (Department of Health, Education, and Welfare); 37-39 (American Bar Association, Section of Administrative Law) (1957).

[*] H.R. Rep. No. 1142, 85th Cong., 1st Sess. 5 (1957); see S. Rep. No. 2129, 85th Cong., 2d Sess. 4 (1958), reprinted in [illegible] Cong. & Ad. Law News 3400, 3403 (1958).

ches, to decide which forum is the most convenient, when two or more petitions are filed on the same day. The crux of its argument is the assertion that sections 10(e) and (f), read together, "clearly show a Congressional preference for the Circuit in which the unfair labor practice took place and a Congressional subordination of the District of Columbia." However, despite the earnestness and skill with which the argument is presented, we cannot accept it.

Quite correctly, the company points out that section 10 (e), as proposed in 1935, would have permitted the Labor Board to seek enforcement of its orders either in the District of Columbia or in the circuit where the unfair labor practice was committed or where the employer resided or did business.[10] It further shows that the District of Columbia Circuit was eliminated as an alternative forum for review.[11] The company assigns two reasons for this change. One was to prevent employers, who alone prior to the Taft-Hartley Act of 1947 could commit unfair labor practices,[12] from being drawn from distant places to Washington at the instigation of the Labor Board. This reason finds ample support in the legislative history[13] and its merit is obvious.

[10] See S. 1958, 74th Cong., 1st Sess. § 10(f) (1935), reprinted in 1 Legislative History of the National Labor Relations Act 1932-1935 [hereinafter cited as Legislative History]; H.R. 6288, 74th Cong., 1st Sess. § 10(f) (1935), reprinted in 2 Legislative History 2465-66 (1935). The present section 10(e) had originally been numbered section 10(f).

[11] See 79 Cong. Rec. 7651 (1935), reprinted in 2 Legislative History 2352 (1935).

[12] Congress in 1947 added section 8(b) to the National Labor Relations Act of 1935, forbidding certain conduct by unions by designating it as unfair labor practices. Labor Management Relations Act, § 101, 61 Stat. 136, 142 (1947), 29 U.S.C.A. § 158(b) (1956).

[13] See Hearings on S. 1958 Before the Senate Committee on Education and Labor, 74th Cong., 1st Sess. 304 (1935), reprinted in 2 Legislative History 1890 (1935).

Secondly, the company discovers a purpose to give the court of appeals, where the unfair labor practice was committed or where the employer resides, jurisdiction to hear the case—in effect, to "localize" the appeal. This supposed second reason lacks substance and brings no additional support to the first. It is true that localization is a necessary corollary to the elimination of the District of Columbia Circuit as an alternative forum in enforcement proceedings under section 10(e). But we find in the legislative history no other reason to prefer the local circuit. There is nowhere a suggestion that the local circuit is more competent to decide the case because of a familiarity with local conditions, or for any other reason.

Our examination of the two sections does not lead us to the proposed conclusion that the purposes underlying the two sections are the same and that the restrictions in section 10(e) upon the jurisdiction of the District of Columbia Circuit in enforcement proceedings, are to be transferred to section 10(f) by interpretation. The policy of not permitting the Board to force employers to come to Washington is not involved in section 10(f). For one thing, this section is constructed differently from section 10(e), for it expressly permits an aggrieved party to seek review in the District of Columbia Circuit even if the unfair labor practice occurred elsewhere. Furthermore, the aggrieved party seeking review could be either an employer, an employee, or a union. By not eliminating, but expressly acknowledging, the District of Columbia as an alternative forum, the apparent aim of Congress is to ease the situation of a losing party desiring review. It affords him a choice denied the Board when it proceeds under section 10(e). It may well be that a practical effect of adopting the "hour and minute" rule will be to increase the number of reviews of Board orders in the District of Columbia Circuit. There is nothing in section 10(f) or in its legislative history to indicate that Congress considered this undo

sizable. If, in a particular case, it is shown that a hearing in that court would impose an undue burden on one of the parties, the case will be transferred to a more suitable forum.[1]

We are not persuaded by the argument that, if the Board cannot force the company to come to Washington, neither should aggrieved parties enjoy the power to choose, at least in the first instance and subject to judicial supervision, the forum in which to litigate with their adversaries. The burden on the Board, an agency of the federal government, of being called upon under section 10(e) to seek enforcement of its orders in various sections of the country, is supportable when the alternative is to impose upon employers and unions the possibility of a burdensome journey to Washington. The case is different, however, under section 10(f). It is the aggrieved party and not the Board which seeks review and chooses the forum; thus, the only party being inconvenienced is the Board. And, when two parties, each aggrieved, seek review as in the present case, the relative inconveniences would vary from case to case, and understandably Congress saw fit to leave this judgment originally to the Board, and since the passage of section 2112(a) to the courts.

It has been pointed out that a party gaining substantially, but not entirely, the relief it sought, might ask review, not for the purpose of obtaining a modification of the Board's order, but to obtain enforcement in the forum of his choice.

[1] See *Local 205, Carpenters Union* v. *NLRB*, 47 Lab. Rel. Rep. 2688 (D.C. Cir. 1961). Motions to transfer were denied by the District of Columbia Circuit in *Brewery Workers* v. *NLRB*, 47 Lab. Rel. Rep. 2688 (D.C. Cir. 1961), and *Local 761, IUE* v. *NLRB*, 47 Lab. Rel. Rep. 2689 (D.C. Cir. 1961). Moreover, the motion in the latter case, the Seventh Circuit, where the employer had filed a petition for review but only after a petition had been subpoenaed by the union in the District of Columbia Circuit, transferred all proceedings to that court. *Ace Tire Co.* v. *NLRB*, 47 Lab. Rel. Rep. 2682, 7th Cir. 1961.

It is suggested that in such a case the substantial witness should in fairness be considered subject to the same limitations as to the selection of a forum as the Board whose decision he is in effect endeavoring to enforce. However, the practical difficulties of ascertaining the petitioner's motive forbid the attempt. Establishing motive could not in the usual case be done satisfactorily by means of simple affidavits. It would be unwise to interpret the statutes so as to burden the courts and the parties with additional litigation involving such preliminary controversies. Perhaps, such a consideration may be addressed to the court in which the case is first instituted to help it determine on motion whether convenience and justice require transfer of the case.

Even if we were persuaded of the superior merit of the proceeding the present petitioner favors, we would not be justified in interpreting the words "first instituted" in the manner proposed. For it is noteworthy that the rule advocated by the company, not only fails to resolve the litigation [illegible] as the "three and more" cases, but would in some cases multiply the difficulties. For example, when one party petitions for review in the circuit where the unfair labor practice occurred and the other party in the same [illegible] in the circuit where he resides, whether or not the Board has its principal office in one of those places, the company's proposed rule would not [illegible] making a choice. We [illegible] here to the congressional mandate to accord [illegible] that court in which the petition is actually first filed.

Petitioner's contentions [illegible] provisions in the Act [illegible] to the United States Court of Appeals [illegible] the Board's order [illegible] the venue of the case [illegible] the National Labor Relations Board.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8512

GEORGE W. BALL, PHILIP M. STERN, ARNOLD SAGALYN and CLAYTON FRITCHEY, t/a NORTHERN VIRGINIA SUN PUBLISHING COMPANY, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition for Review of an Order of the National Labor Relations Board.

No. 8525

GEORGE W. BALL, PHILIP M. STERN, ARNOLD SAGALYN and CLAYTON FRITCHEY, t/a NORTHERN VIRGINIA SUN PUBLISHING COMPANY, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

ROAD W. WHEELER, JR., ET AL., *Intervenors.*

On Petition for a Writ of Mandamus

This matter came on to be heard on the petition for a writ of mandamus directed to the National Labor Relations Board, requiring the Board to file in this Court, rather than in the Court of Appeals for the District of Columbia Circuit, the record in proceedings before the Board numbered 5-CA-1508, et al., and entitled GEORGE W. BALL, PHILIP M. STERN, ARNOLD SAGALYN AND CLAYTON FRITCHEY, T/A NORTHERN VIRGINIA SUN PUBLISHING COMPANY and

ROGER W. WILLIAMS, JR., et al.; upon the memorandum of the petitioners in support of the petition for writ of mandamus; upon the memorandum of the respondent in response to the petition for writ of mandamus; upon the opposition of the intervenors to the petition for writ of mandamus; and the matter was argued by counsel for the petitioners, for the respondent, and for the intervenors.

On consideration whereof, for reasons set forth in the opinion filed herein, it is now here ordered by this Court that the petition for writ of mandamus be, and the same is hereby, denied.

Upon the filing of the record by the National Labor Relations Board in the United States Court of Appeals for the District of Columbia Circuit the proceedings in our case No. 8512, George W. Ball, et al., Petitioners, v. National Labor Relations Board, Respondent, shall be transferred to that Court, and the Clerk of this Court is directed to then transmit the papers to that Court in order that it may exercise jurisdiction in the case.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

MORRIS A. SOPER,
United States Circuit Judge.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

Filed Jan. 30, 1962.

(SEAL)

A true copy.
Teste:
RICHARD M. F. WILLIAMS, JR., Clerk,
United States Court of Appeals,
for the Fourth Circuit.

28 U.S.C. § 2112(a)

§ 2112: Record on Review and Enforcement of Agency Orders

(a) The several courts of appeals shall have power to adopt, with the approval of the Judicial Conference of the United States, rules which so far as practicable shall be uniform in all such courts prescribing the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers, to the extent that the applicable statute does not specifically prescribe such time or manner of filing or contents of the record. Such rules may authorize the agency, board, commission, or officer to file in the court a certified list of the materials comprising the record and retain and hold for the court all such materials and transmit the same or any part thereof to the court, when and as required by it, at any time prior to the final determination of the proceeding, and such filing of such certified list of the materials comprising the record and such subsequent transmittal of any such materials when and as required shall be deemed full compliance with any provision of law requiring the filing of the record in the court. The record in such proceedings shall be certified and filed in or held for and transmitted to the court of appeals by the agency, board, commission, or officer concerned within the time and in the manner prescribed by such rules. If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency, board, commission, or officer concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals.

29 U.S.C. §§ 160 (e) and (f)

Petition to Court for Enforcement of Order. Proceedings: Review of Judgment

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new

findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Review of Final Order of Board on Petition to Court

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified,

or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

. . . . . .

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No. 737

In the Supreme Court of the United States

OCTOBER TERM, 1961

NORTHERN VIRGINIA SUN PUBLISHING COMPANY, A CO-PARTNERSHIP COMPOSED OF GEORGE W. BALL, PHILLIP M. STERN, ARNOLD SAGALYN AND CLAYTON FRITCHEY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington 25, D.C.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
MELVIN J. WELLES,
WARREN M. DAVISON,
Attorneys,
National Labor Relations Board,
Washington 25, D.C.

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In the Supreme Court of the United States

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20a–31a) is not yet reported. The Decision and Order of the National Labor Relations Board are reported at 134 NLRB No. 109.

JURISDICTION

The order of the court of appeals denying the petition for a writ of mandamus was entered on January 30, 1962 (Pet. App. 32a–33a). The petition for a writ of certiorari was filed on February 21, 1962.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitions to review an order of the National Labor Relations Board were filed in two courts of appeals several hours apart on the same day. The question presented is whether, in these circumstances, the court in which the proceeding was "first instituted," within the meaning of 28 U.S.C. 2112(a), should be determined by ascertaining which petition was filed earlier on the particular day or both petitions should be deemed simultaneously filed and proceedings then given to the circuit in which the unfair labor practices took place.

STATUTES INVOLVED

The relevant statutory provisions are set forth at pp. 34a–37a of petitioner's appendix.

STATEMENT

On December 7, 1961, the Board issued its Decision and Order (134 NLRB No. [redacted], 49 LRRM 1268), finding that petitioner Company had engaged in certain unfair labor practices but not in others. The Board found that the Company had discriminatorily laid off or discharged fourteen employees in violation of Section 8(a)(3) of the National Labor Relations Act. It further found that a subsequent strike engaged in by ten other employees was caused by these unfair labor practices. The Board, however, found that the refusal to hire four named "extra" employees was not violative of the Act, nor was the Company's action in changing work schedules. The Board's order di-

rected the Company to cease and desist from the unfair labor practices found and to reinstate, and make whole, the employees discriminated against, and, upon application, the strikers. The order also limited the back pay awarded for certain of the discriminatees whom the Board found had refused valid offers of reinstatement, and dismissed the allegations of the complaint which were not sustained.

At 10 a.m. on December 7, 1961, copies of the Board's Decision and Order were handed to counsel for all the parties, at the Board's offices in Washington, D.C. (Pet. App. 21a). Fifty minutes later, counsel for the discriminatees—the charging parties before the Board—filed a petition, pursuant to Section 10(f) of the Act, in the Court of Appeals for the District of Columbia Circuit to review those portions of the Board's order adverse to them (Pet. App. 21a). Later the same day, counsel for the Company filed a petition in the Court of Appeals for the Fourth Circuit to review those portions of the Board's order adverse to it *(ibid.)*.

Thereafter, the Board informed the Company, upon the latter's inquiry, that it intended to file the certified list of the materials comprising the record in this Board proceeding (which is filed in lieu of the physical record) in the District of Columbia Circuit, pursuant to the provisions of 28 U.S.C. 2112(a), which requires filing of the record in the circuit where a proceeding was "first instituted." (Pet. App. 10a). The Company then filed a petition for a writ of mandamus in the Fourth Circuit, requesting that the

Board be directed to file the certified list in that court rather than in the District of Columbia Circuit. The Company contended that the term "first instituted" in 28 U.S.C. 2112(a) does not contemplate taking into account fractions of a day, and that accordingly when two petitions are filed on the same day it is necessary to fall back on the policy of Sections 10(e) and (f) of the National Labor Relations Act, which creates a preference for judicial review in the circuit in which the unfair labor practices were committed (Pet. App. 1a-8a).

On January 30, 1962, the Fourth Circuit denied the petition for a writ of mandamus and ordered that the Company's petition to review be transferred to the District of Columbia Circuit, pursuant to 28 U.S.C. 2112(a). The court held that the language and history of this provision reveals Congress' intention "to accord priority to that court in which the petition is actually first filed, leaving it to the court to consider any claims based upon the 'convenience of the parties in the interest of justice'" (Pet. App. 31a).

ARGUMENT

The decision of the court below is clearly correct, and there is no conflict of decisions. No issue warranting review by this Court is thus presented.

1. Section 10(f) of the National Labor Relations Act gives any "person aggrieved by a final order of the Board" the right to obtain review in the court of appeals in the circuit where the unfair labor practices were committed, where the person resides or

transacts business, or in the District of Columbia Circuit (where the Board has its main office). Two persons were aggrieved by the Board's order in this case, the Company and the charging parties, and each petitioned for review in a different circuit—the former in the circuit where the unfair labor practices were committed and the Company did business,[1] and the latter in the District of Columbia. Congress has provided in 28 U.S.C. 2112(a) that, where multiple petitions are filed, the agency "shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted," and the other courts shall transfer their proceedings to the court "in which the record has been filed." The statute further provides that: "For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals." The narrow question in this case is, in what court is a proceeding "first instituted" when multiple petitions are filed in two courts on the same day. The court below concluded that it was the court in which a petition "is actually first filed," taking into account the hour and minute of the respective filings. Petitioner, on the other hand, contends that petitions filed on the same day should be regarded as equal in time, and that a preference should be given to the circuit in which the unfair labor practices were committed.

---

[1] The unfair labor practices found were committed in Arlington, Virginia, where the Company, a partnership, is engaged in the publication of a newspaper (Pet. App. 21a).

We submit that there is no warrant for petitioner's interpretation of 28 U.S.C. 2112(a). The specific language of 28 U.S.C. 2112(a) makes the time the respective petitions are filed the sole basis for determining the priority of proceedings which, under Section 10(f) of the Act, may properly be brought in several different districts. The phrase "first instituted" normally means first in time. Indeed, petitioner so concedes when petitions are filed on different days. But the statute suggests no different standard to be applied when the petitions are filed on the same day. A proceeding brought at 10:50 a.m. is certainly "first instituted" *vis-à-vis* a proceeding brought in the afternoon.

The legislative history of 28 U.S.C. 2112(a) shows, as the court of appeals found, that Congress desired that "a judgment as to what forum will be most convenient to the parties [should] be made by a court and not by the agency whose order is under review," and that "the court which is to make that decision [should be] determined by a fixed rule of thumb—it shall be that court in which the petition for review was first filed" (Pet. App. 27a). To interpret "first instituted" as requiring that priority be based on the time the petitions were filed, where successive petitions are filed on the same day, just as when they were filed on different days, furthers this objective. It is a fairly mechanical process to determine the hour and minute when a petition has been filed and therefore which forum enjoyed priority in time; the agency could thus discharge its function with a minimum of discretion, file the record in the

court having the earliest petition, and then leave the court with the task of deciding whether "the convenience of the parties" or "the interest of justice" (28 U.S.C. 2112(a)) would require that the proceeding be transferred to another forum.

2. Petitioner's contention (Pet. 9–17) that the "hour and minute test" tends to create a preference in favor of the District of Columbia Circuit, contrary to the policy of Sections 10 (e) and (f) of the Act, is without merit. First, as the court below properly concluded (Pet. App. 28a–30a), there is nothing in the terms or history of those provisions which suggests that Congress desired to channel a review proceeding brought by the aggrieved party into the court of appeals where the unfair labor practice was committed or the respondent resides. Petitioner emphasizes that Section 10(e) permits the Board to petition to enforce its order in only those two forums, while Section 10(f) gives an aggrieved person, if he elects to institute the proceeding instead of waiting for the Board, the additional option of bringing the case in the District of Columbia Circuit. But this comparison of Sections 10 (e) and (f) shows that Congress in Section 10(f) desired "to ease the situation of a losing party desiring review"; that is, it denied the Board the power to force that person to come to Washington, but, at the same time, afforded him the opportunity to do so if he desired (Pet. 29a).

Second, the extent of the preference which the hour-and-minute test would create in favor of the District of Columbia is highly speculative. In the normal situation, where the Board decision is mailed to the

parties instead of being handed to them at the Board's Washington office (as was done here), they would be in a position to file in their "home" circuit perhaps even more quickly than a petition could be filed in the District of Columbia. Moreover, even assuming that it is easier to file first in the District of Columbia Circuit, it does not follow that the case will remain there. If a party is able to persuade that court—and this opportunity is open to petitioner here—that the case ought to be transferred to some other circuit for "the convenience of the parties in the interest of justice," the court of appeals has power under 28 U.S.C. 2112(a) to do so.

Finally, whatever preference the hour-and-minute test may create in favor of the District of Columbia Circuit, we have seen above (pp. 6-7) that the test effectuates the purpose of 28 U.S.C. 2112(a).

3. The interpretation of 28 U.S.C. 2112(a) by the court below is consistent with that underlying the decision of the District of Columbia Circuit in *Local 833, United Automobile Workers* v. *National Labor Relations Board (Kohler Co.)*, 47 LRRM 2609 (November 23, 1960), certiorari denied, 365 U.S. 869. There, as here, multiple petitions to review the same Board order were filed on the same day in two different

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[1] The District of Columbia Circuit granted a motion to transfer in *Local 2074, Carpenters* v. *National Labor Relations Board (Butcher Boy Refrigerator Door Co.)*, 47 LRRM 2688 (September 16, 1960). It has denied such motions in *Local 833, United Automobile Workers* v. *National Labor Relations Board (Kohler Co.)*, 47 LRRM 2609 (November 23, 1960), certiorari denied, 365 U.S. 869, and *Brewery Workers* v. *National Labor Relations Board (Gulf Battlers, Inc.)*, 47 LRRM 2688 (October 3, 1960).

circuits 35 minutes apart. The Board, finding that the petition filed in the District of Columbia Circuit was first under the hour-and-minute test, so advised that court and the Seventh Circuit (the other court involved), and proceeded to file the record in the District of Columbia Circuit. The Company then moved the latter court to transfer the case to the Seventh Circuit, which motion was denied. Implicit in this ruling, and in the Seventh Circuit's subsequent transfer of the petition before it to the District of Columbia, is an acceptance of the hour-and-minute test for determining, for purposes of 28 U.S.C. 2112(a), the court in which the proceeding was "first instituted." See also the Board's Brief in Opposition to Certiorari in *Kohler Company v. Local 833, UAW*, No. 707, Oct. Term, 1960, pp. 9-10.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
MELVIN J. WELLES,
WARREN M. DAVISON,
Attorneys,
National Labor Relations Board.

MARCH 1962.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 737

NORTHERN VIRGINIA SUN PUBLISHING COMPANY, a co-partnership composed of George W. Ball, Philip M. Stern, Arnold Sagalyn and Clayton Fritchey, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, and ROGER W. WHEELER, ET AL., *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT, ROGER W. WHEELER, ET AL., IN OPPOSITION.

SEYMOUR J. SPELMAN
823 South Washington Street
Alexandria, Virginia
Counsel for Respondent Roger W. Wheeler, et al.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CITATIONS

Cases:

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Statutes:

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OPINION BELOW

The opinion of the Court of Appeals is not yet reported but is printed in the Appendix to the Petition herein at pages 20a through 31a. The Decision and Order of the National Labor Relations Board is reported at 130 NLRB No. 109.

JURISDICTION

The order of the Court of Appeals denying the writ of mandamus was entered on January 30, 1962, and is printed in the Appendix to the Petition on pages 32a and 52b. The petition for a writ of certiorari was filed on February 21, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Where a petition for review of a National Labor Relations Board order is filed in the District of Columbia Circuit at 10:50 a.m. on December 7, 1961, by aggrieved employees, and a second petition for review of the same order is filed later that same day in the Fourth Circuit by the aggrieved employer, in which circuit was the proceeding "first instituted" within the meaning of Title 28 U.S.C. Sec. 2112(a)?

STATUTES INVOLVED

The statutes involved are:

(1) Section 2112 of the Judicial Code, Act of August 28, 1958, 72 Stat. 941, 28 U.S.C. Section 2112.

(2) Sections 10 (e) and (f) of the National Labor Relations Act, as last amended September 14, 1959, 73 Stat. 544, 29 U.S.C. Section 160 (e) and (f).

They are set forth verbatim at pp. 34a-37a of petitioners' appendix.

STATEMENT

On December 7, 1961, at 10 a.m. the Board issued and distributed to the parties its Decision and Order in which it found petitioners guilty of certain unfair labor practices and dismissed the complaint as to cer-

tain others.[1] At 10:50 a.m. the same day, present intervenors (the 28 employees aggrieved by the Decision and Order) filed a petition for review of the Board's Decision and Order in the District of Columbia Circuit. Later that same day, petitioners (the employer-respondents in the Board proceeding) filed their petition for review in the Fourth Circuit.

Title 28 U.S.C., Sec. 2112(a) requires that "If proceedings have been instituted in two or more courts of appeals with respect to the same order the . . . board . . . shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted." Notwithstanding the acknowledged priority in time of filing by intervenors and the obvious convenience of the D.C. Circuit for *all* parties as reviewing forum, petitioners on December 26, 1961, filed a Petition for Writ of Mandamus in the Fourth

[1] The Board found that petitioners, in March 1959, unlawfully discharged 34 of its employees and caused 10 others to engage in an unfair labor practice strike. However, it narrowly restricted the back pay remedy as to those discriminatees and dismissed the complaint as to four of the discharged employees and as to certain other alleged illegal actions.

[2] But it may be noted that in the present case there is not a single circumstance which could justify the transfer from the D.C. Circuit to this Court. All of the parties and all of the attorneys live in the District of Columbia or in the Metropolitan Washington area. The petitioner's plant is located in the Metropolitan Washington area, and the newspaper it publishes is circulated there. And the union which represents all the employees involved in the proceeding has its office in the District of Columbia. Literally, there is not a single person involved in this cause who lives within 100 miles of this Court; everyone involved is within a short ride to the D.C. Circuit Court Building. Opposition of Intervenors to Petition for Writ of Mandamus, Petitioners' Appendix, pp. 17a and 18a.

Circuit seeking to compel the Board to file the record there rather than in the District of Columbia Circuit.

On January 30, 1962, the Fourth Circuit (Sobeloff, C. J. speaking for a unanimous court) denied the petition on the ground that the District of Columbia Circuit was clearly the court in which the proceeding was "first instituted" and that no relief through extraordinary writ from the Fourth Circuit was appropriate since petitioners had an adequate statutory remedy in the D. C. Circuit by motion to "transfer all the proceedings to any other court of appeals . . . for the convenience of the parties in the interest of justice." Title 28 U.S.C. Sec. 2112(a)

Petitioners filed no such motion. Instead, on February 21, 1962, they brought the present petition to this Court seeking a reversal of the Fourth Circuit's refusal to order the record to be filed in that court.

On February 21st, the D. C. Circuit (Fahy, Danaher and Bastian) unanimously rejected a motion to postpone the filing of the record in that court pending a ruling on the present Petition for Certiorari. And on February 22nd, the Fourth Circuit denied petitioner's motion to stay its judgment during the pendency of the present petition.

ARGUMENT

Petitioners' argument rationalizing their forum-shopping presents no issue warranting review by this Court. They pose a problem in statutory construction where none exists and then seek to imbue it with an urgency it does not have. In rejecting their argument the Fourth Circuit was plainly correct, as underscored by the refusals to stay the proceedings during the

pendency of this petition. There is no conflict among the circuits on the "issue" and petitioners claim none. Moreover, since petitioners have the right under the statute to move for transfer to the Fourth Circuit on the all-sufficient grounds of convenience and justice, the initial refusal of the Fourth Circuit to assert jurisdiction lacks the finality essential to review.

1. The statutes governing review of Board orders on petition by aggrieved parties are clear and simple, both in language and purpose, and the logic of the Fourth Circuit in construing them in the present context is irresistible.

Title 29 U.S.C., Section 160(f), provides that "Any person aggrieved by a final order of the Board . . . may obtain a review of such order in any United States Court of Appeals in the Circuit wherein the unfair labor practice in question was alleged to have been engaged in . . . , or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition . . ."

Title 28 U.S.C., Section 2112(a), provides: "If proceedings have been instituted in two or more courts of appeals with respect to the same order the . . . board . . . shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted."

Upon the filing of the record, the jurisdiction of that court is exclusive (29 U.S.C., Sec. 160(e) and (f)), and "The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed". 28 U.S.C. 2112(a).

In view of the undisputed priority in time of filing of intervenors' petition and the plain meaning of the relevant statutes, the Fourth Circuit held that intervenors' petition in the D. C. Circuit was the "first instituted" and rejected petitioners' effort to restrain the Board from filing the record in that circuit. Pursuant to 28 U.S.C. §2112(a), the Court then directed its clerk to transfer petitioners' papers to the D. C. Circuit "in order that it may exercise jurisdiction in the case". (Appendix to Petition, p. 37a.) It would not seem that any serious question could be raised as to the correctness of that ruling.

Petitioners argue, however, that their petition, though second in time, should nevertheless be treated as first. To reach this result they contrive a construction of the words "first instituted" by reading into the statutory scheme a Congressional preference for having petitions for review of Labor Board orders heard in the circuit where the unfair labor practices occurred (here, the Fourth Circuit) rather than in the D. C. Circuit. To effectuate that claimed preference in the present circumstances, they ask this court to ignore priority in time of filing within the same day, treat the two petitions as having been simultaneously filed and resolve the resultant jurisdictional deadlock in favor of the Fourth Circuit.

Under this reasoning, intervenors' petition would move from its acknowledged first position to a tie with petitioners', and thus to second place by application of the tie-breaking preference for the circuit where the unfair practices occurred. By this alchemy of construction, their second-place petition becomes transmuted to that of "first instituted."

But the provision governing petitions for review by aggrieved parties discloses no Congressional prefer-

ence for one circuit over another. [29 U.S.C. 160(e).] To the contrary, in the case of multiple petitions filed in different circuits, Congress explicitly resolved the jurisdictional conflict in terms of time ("first instituted"), not place; and on subsequent motions for transfer, it expressed its preference, not on the basis of where the unfair practices occurred, but on the basis of "convenience of the parties in the interest of justice."

It is true that the statute does not permit the Board itself to initiate enforcement proceedings in the D. C. Circuit [29 U.S.C. 160(e)], but the policy underlying that limitation on Board action cannot be indiscriminately imported into the separate provision governing petitions for review instituted by aggrieved parties. As Judge Sobeloff points out: ". . . this section is constructed differently . . . for it expressly permits an aggrieved party to seek review in the District of Columbia Circuit even if the unfair labor practice occurred elsewhere . . . By not eliminating, but expressly acknowledging, the District of Columbia as an alternative forum, the apparent aim of Congress is to ease the situation of a losing party desiring review. It affords him a choice denied the Board when it proceeds under section 10(e)."

2. Petitioners seek to impart an urgency to the question with the extravagant assertion that the time-clock rule for determining priority of filing "guarantees" that all petitions for review will be heard in the District of Columbia, to the exclusion of other circuits. (Petition, p. 7.) The short answer is that it has not worked out that way after four years of experience under the statute; this Court may properly take judicial notice of the fact that petitions for review are fairly well distributed among all circuits.

Moreover, since the Board's normal practice is to mail its decisions to the parties (Brief For the National Labor Relations Board In Opposition, pp. 7, 8), the contrary argument could be fashioned, in a particular case, that such practice favors the "home" circuit to the exclusion of the District of Columbia. The point is that neither argument is relevant.[2] Although the possibilities of preference and forum non conveniens do exist under the time clock rule, Congress has provided an adequate and simple remedy in Title 28, U.S.C. Sec. 2112(a) which states that where proceedings have been instituted in two or more courts, that court in which the proceeding was "first instituted" has the discretion to "transfer all the proceedings with respect to such order to any other court of appeals . . . for the convenience of the parties in the interest of justice."[3]

This is a sensible and easily administered resolution of any inequities involved in the review procedure to the extent there is such problem[4] for, as Judge Sobe-

[2] The D.C. Circuit is sensitive to the demands of convenience and justice in the proper circumstances, as evidenced by its transfer of the proceedings in *Local 2270, Carpenters v. National Labor Relations Board; Butcher Boy Refrigerator Co.*, 47 LRRM 2088 (Sept. 26, 1960).

[3] As petitioners point out, the questions sought to be presented in this case have not been passed upon and are raised for the first time in this Court. So far as we have been able to determine, the forum non conveniens problem in a Labor Board proceeding has arisen in only three cases: *Local 833, United Automobile Workers v. National Labor Relations Board; Kohler Co.*, 47 LRRM 2600 (Nov. 23, 1960), certiorari denied, 365 U.S. 810; *Brewery Workers v. National Labor Relations Board; Gulf Battlers, Inc.*, 47 LRRM 2688 (Sept. 1, 1960); *Local 2270, Carpenters v. National Labor Relations Board; Butcher Boy Refrigerator Door Co.*, 47 LRRM 2088 (Sept. 26, 1960).

loff notes: "when two parties, each aggrieved, seek review as in the present case, the relative inconveniences would vary from case to case, and understandably Congress saw fit to leave this judgment (as to forum) originally to the Board, and since the passage of section 2112(a) to the courts." (Petition, Appendix, p. 30).

3. This statutory remedy, entirely adequate to redress any potential inequities in the determination of the forum for review, has not been exhausted by petitioners. Any prejudice which petitioners could legitimately claim resulting from review in the District of Columbia as against the Fourth Circuit is within the protective ambit of the statutory words "convenience and justice." The initial refusal of the Fourth Circuit to assert jurisdiction cannot therefore be regarded as a final order for which review by this Court is available. The fact that the question petitioners seek to present here cannot be raised in the same form at a later stage of this case (Petition, p. 7) does not of itself create finality in the appellate sense. Nor, in view of the statutory scheme, can finality be created by the rejection of a frivolous petition for mandamus.

CONCLUSION

For the reasons above set forth, it is respectfully requested that the writ of certiorari be denied.

Respectfully submitted.

SEYMOUR J. SELIGMAN
833 South Washington Street
Alexandria, Virginia
Counsel for Respondent
Roger W. Wheeler, et al.